



U. S. Department of Justice

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February 9, 2006

Michael Nicley, Chief  
Bureau of Customs & Border Protection  
1970 West Ajo Way  
Tucson, AZ 85713

Dear Mr. Nicley:

Beginning March 1, 2006, the Arizona U.S. Attorney's Office will follow a new policy—the "Recording Policy." With limited exceptions this Recording Policy shall require the recording of an investigative target's statements, and will be in effect for all cases submitted to the Arizona U.S. Attorney's Office. In brief, the Recording Policy: (i) sets out a general rule for the recording of an investigative target's statement either overtly or covertly at the discretion of the interviewing agency, (ii) clarifies that the rule does not apply where taping would be unreasonable; and (iii) defines "investigative target". This policy will make all of us more effective in holding those who commit crimes accountable, and it is that belief that spawned this policy. The complete Recording Policy is appended to this letter.

Before turning to the details of the Recording Policy, I want to stress that every effort was made to craft the policy with utmost regard for legitimate concerns against recording custodial interrogations. First, it often is said that it is not practical to record a custodial statement in a fast-breaking case where arrests are happening in the field, or that there might be a variety of reasons for not recording where a probable cause arrest leads to a decision to immediately cooperate. Mindful of those concerns, the Recording Policy does not adopt a rule that all custodial statements at all times in all circumstances must be recorded, and does adopt an express exception precisely to cover situations where obtaining a taped statement would not be practical. Second, some believe that taping a statement can inhibit some individuals from talking. However, there is no hard and fast rule under the Recording Policy

that all statements in every circumstance must be overtly recorded. Additionally, covert recordings are legal and acceptable.\*

While there might be reasonable concerns about any recording policy, no one can reasonably dispute that there are sound reasons in favor of a taping policy. Here then is a summary of the reasons that I considered in the implementation of the Recording Policy:

**1. Evidentiary Value.** A recorded statement is the best evidence as to what was said. As such, the Recording Policy eliminates the many baseless, but facially plausible, arguments we face from defense counsel that can be made only because there was no recording.

**2. Facilitation of Admissibility.** We spend countless hours in extensive hearings arguing with defense counsel over admissibility of a defendant's statement. The Recording Policy will reduce this time-consuming litigation. Without a tape recording to rebut accusations of improper conduct, defense counsel frequently argues that the defendant's mental health or intoxication at the time of the interview make his statement inadmissible. Defense counsel also allege that a defendant was unable to understand the *Miranda* warnings or the exact nature of the questions due to language barriers. The courts have consistently noted that these issues would rarely exist if the government taped the confession. I agree.

**3. Jury Impact.** A defendant's admission regarding his own criminal conduct is often the single most powerful piece of evidence in a case. We have received negative feedback from jurors regarding the failure of agents to tape confessions. Jurors today are inundated with technology. They get much of their information from television and the internet. They know that electronic devices can be tiny, effective and cheap. Much of the evidence they now see in court has been digitized and is presented to them on flat screen monitors in the jury box. As a result, they question why they are asked to take the word of an agent that a defendant admitted criminal responsibility, when a defendant's statement could have been recorded using a low tech tape recorder.

**4. Enhancing Law Enforcement.** While I have confidence in the credibility of agents who testify about what occurred during an unrecorded confession, we are not the judge who decides whether to admit the confession, nor are we the trial jury assessing whether to convict. We must take steps to enhance our ability to obtain convictions. The recording policy will help law enforcement in a number of critical areas. Agents would no longer be subjected to cross examinations about abusive interview tactics. Agents would

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\* The possible dampening effect of overt recordings has been addressed by the 300-plus law enforcement agencies that do record statements. The results of a formal 1998 study by the International Association of the Chiefs of Police have not found that recording custodial interrogations impacts a suspect's willingness to talk.

conduct more effective interviews because they would not have to worry about taking copious notes. Instead, agents could focus all of their attention on the defendant, the defendant's demeanor and the substance of the answers. Agents would have an opportunity to review the statement interviews later in detail to explore new leads and to identify inconsistencies that might have been overlooked initially. The public's confidence in law enforcement would increase as courts and the public could hear and see for themselves that officers have nothing to hide.

The Recording Policy strives to take account of all these reasons and concerns. Indeed, having given due regard to the common concerns and reasons for tape recording, implementing the Recording Policy becomes all the more compelling.

We are grateful for the hard work and effort that you and your agents do to combat crime in the District of Arizona. By implementing this policy we will be better able to ensure that the U.S. Attorney's Office holds the individuals who commit those crimes accountable. Thank you for your cooperation in this effort.

Yours,

A handwritten signature in black ink, appearing to read "Paul K. Charlton", with a stylized, flowing script.

PAUL K. CHARLTON  
United States Attorney  
District of Arizona

## **The Recording Policy**

**Rule:** Cases submitted to the United States Attorney's Office for the District of Arizona for prosecution in which an investigative target's statement has been taken, shall include a recording, by either audio or audio and video, of that statement. The recording may take place either surreptitiously or overtly at the discretion of the interviewing agency. The recording shall cover the entirety of the interview to include the advice of Miranda warnings, and any subsequent questioning.

**Exception:** Where a taped statement cannot reasonably be obtained the Recording Policy shall not apply. The reasonableness of any unrecorded statement shall be determined by the AUSA reviewing the case with the written concurrence of his or her supervisor.

**Definition:** Investigative target shall mean any individual interviewed by a law enforcement officer who has reasonable suspicion to believe that the subject of the interview has committed a crime. A witness who is being prepared for testimony is not an investigative target.